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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioners,
v.
MILHELM ATTEA & BROS., INC.,
Respondent.

JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE, *et al.*,
Petitioners,
v.
ELIAS H. ATTEA, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Indian trader statutes, 25 U.S.C. §§ 261-64, prohibit New York from engaging in reasonable regulation of cigarette wholesalers to prevent widespread tax evasion by non-Indians.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Among the most important of such issues are those which involve state and local government tax collection schemes.

Like other States, New York has had to confront the problem of persons purchasing cigarettes in stores located on Indian reservations to evade payment of the State's excise tax. To prevent this revenue loss, estimated to be at least $65 million annually, *see* Pet. Br. 11, New York imposed various collection and record-keeping obligations on cigarette wholesalers. The New York Court of Appeals held, however, that the Indian trader statutes, 25 U.S.C. §§ 261-64, pre-empt the State's scheme. Not only is this decision inconsistent with this Court's cases interpreting the Indian trader statutes, it presents a grave threat to state efforts to design effective tax collection schemes which address this problem of tax evasion.

Because the Court's decision will have a direct impact on this issue of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

New York, like other States which have Indian reservations within their borders, confronts the serious problem of tax evasion caused by non-Indians purchasing cigarettes, motor fuel, and other goods at reservation stores that do not collect state excise taxes. In New York, this revenue loss is the "largest single form of tax evasion" confronting the State, Dana Milbank, *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2 (quoting Commissioner James W. Wetzler), and is now estimated at $100 million annually.[2] *See* Pet. Br. 11 & n.4. In an effort to address this serious problem, New York devised a scheme to facilitate the collection of these indisputably valid taxes from non-Indian taxpayers.

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

[2] This figure includes $65 million in lost cigarette taxes and $35 million in lost motor fuel taxes. *See* Pet. Br. 11 & n.4.

New York's scheme for collecting cigarette excise taxes has three principal features. First, the State requires that the tax be paid through the purchase of stamps at the time of the first taxable sale by a wholesaler. *See* N.Y. Tax Law § 471(2). This obligation applies to all wholesalers regardless of whether they supply Indian or non-Indian retailers. *See id.* Second, in recognition that enrolled Indians cannot be taxed on cigarettes they purchase on their reservations for their own consumption, New York allows Indian retailers to purchase tax exempt (unstamped) cigarettes. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.6. To protect against tax evasion by non-exempt persons,[3] New York nominally limits Indian retailers to purchasing an amount equal to the "probable demand of qualified consumers in the trade territory." N.Y. Comp. Codes R. & Regs. tit. 20, §§ 335.6(d); 335.7(c) & (d). New York also requires wholesalers to obtain approval from either the tribe or the State as to the amount of untaxed cigarettes to be sold. *See id.* § 335.7(b)-(d). Finally, New York requires wholesalers to maintain certain records of both their taxable and tax exempt cigarette sales. *See id.* § 335.6(g); N.Y. Tax Law § 474(4).

Relying on this Court's decision in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the New York Court of Appeals held that the Indian trader statutes, 25 U.S.C. §§ 261-64, pre-empted the State's scheme for collecting excise taxes due on sales to non-Indians. According to the court, the State's collection scheme is an invalid "attempt[] to regulate in an area which Congress has taken 'fully in hand' " and "impinges on the federal interest, as evidenced by the Indian trader statutes, to 'comprehensively . . . regulate the businesses selling goods to reservation Indians.' " Pet. App.

[3] This Court's decisions establish that both non-Indians and those Indians who are not enrolled in the tribe are subject to state taxation. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 160-61 (1980). Accordingly, this brief uses the terms non-exempt and non-Indians interchangeably to refer to those persons subject to the State's taxes.

11 (citations omitted). The court further reasoned that the State's scheme "impinges on" the federal government's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" *Id.* at 11-12 (quoting 25 U.S.C. § 261). Moreover, the court reasoned that the State's scheme imposes "financial burdens on [the wholesalers] or the Indians with whom [they] deal[] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian commissioner." *Id.* at 12 (quoting *Warren Trading Post*, 380 U.S. at 691).

SUMMARY OF ARGUMENT

Because "traditional notions of Indian self-government are . . . deeply engrained in our jurisprudence," *Ramah Navajo School Bd. v. Bureau of Rev.*, 458 U.S. 832, 837 (1982) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)), the Court has generally eschewed reliance on "standards of pre-emption developed in other areas" in favor of a balancing approach examining "the relevant state, federal and tribal interests." *Id.* at 838 (citing *White Mountain*, 448 U.S. at 143-45). Accordingly, where federal statutes are designed to "promot[e] tribal independence and economic development," the Court has generally applied a presumption against the exercise of state authority. *Id.* at 838; *see also Rice v. Rehner*, 463 U.S. 713, 719-20 (1983). Where state regulation does not implicate a traditional aspect of tribal sovereignty, however, the Court has not "appl[ied] a presumption of a lack of state authority," *Rice*, 463 U.S. at 726, but instead looked only for conflict between the state and federal schemes. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976) (quoting *United States v. McGowan*, 302 U.S. 535, 539 (1938)); *cf. Rice*, 463 U.S. at 726.

The Indian trader statutes do not confer any direct benefit on the Indian tribes. And the Court's decisions in

Moe and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), foreclose any argument that notions of tribal sovereignty and economic development entitle the tribes to market an economic advantage based on tax free sales to non-exempt persons. *See Moe*, 425 U.S. at 482-83; *Colville*, 447 U.S. at 155-57. The circumstances of this case thus demonstrate that it is inappropriate to apply the "presumption of pre-emption" of state powers. *Rice*, 463 U.S. at 726. The Court need only determine whether New York's scheme "'conflict[s] with the federal enactment[],'" here, the Indian trader statutes. *Moe*, 425 U.S. at 483 (quoting *McGowan*, 302 U.S. at 539).

None of the principal features of New York's scheme conflicts with any provision of the Indian trader statutes. New York does not assert any power which even arguably implicates the federal government's authority to regulate the selection or licensing of "proper person[s] to engage in" trade with the Indians, *see* 25 U.S.C. § 262, "to prohibit the introduction of goods" into the Indian country, 25 U.S.C. § 263, or to order the forfeiture of goods introduced by unlicensed traders. *See* 25 U.S.C. § 264. And contrary to the holding of the New York Court of Appeals, the State does not assert any power which "impinges on" the federal government's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" *See* Pet. App. 11-12 (quoting 25 U.S.C. § 261). New York does not assert authority to specify the "kind . . . of goods" which Indian wholesalers can sell to retailers. Nor does New York assert any power to "specify the quantity of" cigarettes which Indian wholesalers can sell to retailers. New York does not limit the quantity of taxed product which can be sold. And while New York nominally limits the amount of tax exempt product which wholesalers can sell to the "probable demand" of the exempt Indian tribe, *see* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.7(d)(1), federal Indian policy does not authorize the tribes "to market an exemption from state taxation to persons who would normally do their business

elsewhere." *Colville*, 447 U.S. at 155. The State can thus limit a tribe's purchases of tax-exempt product to the personal consumption of its members as a "reasonably necessary . . . means of preventing fraudulent transactions." *Id.* at 160.

Nor does New York's requirement that wholesalers collect the tax due on non-exempt product interfere with the Commissioner's power to "specify[] . . . the prices at which [cigarettes] shall be sold." 25 U.S.C. § 261. The State does not assert any power to regulate prices; wholesalers and retailers remain free to bargain over the price of cigarettes, subject only to applicable federal regulations. Moreover, while New York requires that the excise tax "be added to and collected as part of the sales price of the cigarettes," N.Y. Tax Law § 471(3), in their ordinary meanings the terms "price" and "tax" are too distinct to conclude that section 261's purpose was to prohibit the States from requiring Indian wholesalers to collect a lawfully imposed excise tax at the time of the product's sale to Indian retailers.

Moreover, the Court has recognized that "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].'" *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). The historical context of section 261's enactment, as evidenced by the provisions of numerous treaties by which the United States guaranteed the tribes that non-Indians would not be allowed onto their reservations, *see, e.g.*, Treaty With The Crow Indians, May 7, 1868, art. 2, 15 Stat. 649, 650, as well as provisions of federal law requiring all individuals trading with the Indians to obtain licenses, Act of June 30, 1834, ch. 161 §§ 2 & 4, 4 Stat. 729-30, and prohibiting nearly all barter trade between non-Indians and Indians, *id.* § 7, 4 Stat. at 730, demonstrate that Congress did not contemplate that Indian trading posts would become centers of widespread tax evasion by non-Indians, selling them millions of dollars

a year in untaxed goods. Given the historical context of section 261's enactment, it is inappropriate to attribute to it pre-emptive force over New York's efforts to collect lawful taxes from non-Indians.

The New York Court of Appeals also erred in holding that to the extent the State collected tax on stamped cigarettes, it imposed " 'financial burdens on [the wholesalers] or the Indians with whom [they] deal . . . and could thereby disturb and disarrange the statutory plan set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.' " Pet. App. 12 (quoting *Warren Trading Post*, 380 U.S. at 691). The incidence of the tax invalidated in *Warren Trading Post* fell squarely on the Indian trader. In contrast to *Warren Trading Post*, the tax at issue here is ultimately borne by non-exempt persons when they purchase cigarettes for their own consumption. *See* Pet. App. 4; N.Y. Tax Law § 471(2). The tax is thus no different than the taxes upheld in *Moe* and *Colville*. *See Moe*, 425 U.S. at 482-83; *Colville*, 447 U.S. at 154-61. It is only fair that those receiving the benefit of state-provided services should not be allowed "to flout [their] legal obligation to pay the tax[es]" which fund them. *Moe*, 425 U.S. at 482.

Nor does the State's scheme frustrate the congressional purpose to protect the Indians from fraudulent or unfair prices. New York does not assert any authority to regulate prices. Moreover, because New York requires tax stamps to be affixed to each package of taxable cigarettes as well as duplicate invoices detailing the quantity and wholesale price of the items delivered for both taxable and tax-exempt product, the State's scheme does not frustrate the congressional purpose to protect against fraudulent prices. *See* N.Y. Tax Law §§ 471(2), 474(4); N.Y. Comp. Codes R. & Regs., tit. 20, § 335.6(g)(2).

The New York Court of Appeals also erred in relying on *Warren Trading Post* to hold that the State's scheme was pre-empted because it "attempts to regulate in an area which Congress has taken 'fully in hand.' " Pet. App.

11 (quoting 380 U.S. at 690). While in *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Court relied on *Warren Trading Post* for the proposition that the Indian trader statutes occupy the field so as to foreclose state regulation, the Court's decisions in *Moe* and *Colville* make clear that States can impose requirements on Indian traders so long as they are "reasonably necessary as a means of preventing fraudulent transactions." *Colville*, 447 U.S. at 160. Because New York's requirements meet this standard, its scheme is not pre-empted.

ARGUMENT

I. NEW YORK'S TAX COLLECTION SCHEME IS NOT PRE-EMPTED UNLESS IT CONFLICTS WITH THE INDIAN TRADER STATUTES

This Court has long recognized that no function of state government is more essential to its sovereignty than the administration and collection of tax revenues. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 560 (1830); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819). As the Court stated in *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1870):

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

78 U.S. (11 Wall.) at 110. In a long line of cases, the Court has accordingly "recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981); *see also United States v. California*, 113 S. Ct. 1784 (1993); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Mathews v. Rodgers*, 284 U.S. 521 (1932); *First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450 (1924).[4]

The question presented in this case—whether the Indian trader statutes, 25 U.S.C. §§ 261-64, pre-empt New York's administrative scheme for preventing widespread evasion of valid excise taxes by non-Indian purchasers of cigarettes—counsels a similar approach. As the Court recently reaffirmed, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991). A State's efforts to address widespread evasion of lawful taxes is within these sovereign powers.

To be sure, the regulation of commerce with the Indian tribes has long been an important federal concern. In recognition that "traditional notions of Indian self-government are . . . deeply engrained in our jurisprudence," *Ramah Navajo School*, 458 U.S. at 837 (quoting *White Mountain*, 448 U.S. at 143), the Court has generally eschewed reliance on "standards of pre-emption developed in other areas" in favor of a balancing approach examining "the relevant state, federal and tribal interests." *Id.* at 838 (citing *White Mountain*, 448 U.S. at 143-45). Thus, in cases implicating tribal sovereignty interests, the Court has frequently recast the presumption against pre-emption of state authority into a presumption against the exercise of state authority. *See, e.g., id.; White Mountain*, 448 U.S. 142-45. As the Court stated in *Ramah Navajo School*, in such cases "ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly

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[4] These cases generally did not involve questions of statutory construction but rather the Court's equitable discretion in declining to exercise jurisdiction, *see, e.g., Fair Assessment*, 454 U.S. at 113-16; or the exercise of common law adjudication. *See, e.g., California*, 113 S.Ct. at 1787-90. But this principle is validly applied here where a federal statute assertedly pre-empts a State from addressing widespread evasion of a lawfully imposed tax.

announced an intention to pre-empt state activity." 458 U.S. at 838 (citing *White Mountain*, 448 U.S. at 143-44, 150-51). Thus, at times the Court has stated that State law is pre-empted " 'except where Congress has expressly provided that State laws shall apply.' " *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171 (1973) (quoting Felix Cohen, *Federal Indian Law* 845 (1958 ed.)).

Nonetheless, where state regulation does not implicate a traditional aspect of tribal sovereignty, the Court has not "appl[ied] a presumption of a lack of state authority." *Rice*, 463 U.S. at 726. The nature of the federal legislation at issue here and the absence of any tradition of tribal sovereignty authorizing sales to non-Indians free from valid state excise taxes demonstrate the inappropriateness in this case of applying the "presumption of pre-emption." *Id.* at 724-26.

Unlike those congressional enactments designed to "promot[e] tribal independence and economic development," *Ramah Navajo School*, 458 U.S. at 838, the Indian trader statutes were aimed principally at providing the federal government with a means of controlling the lawlessness of white settlers. *See* Francis P. Prucha, *American Indian Policy In The Formative Years* 48 (1962).[5] And

[5] As Professor Prucha wrote concerning the Indian trader statutes' predecessors:

> The genesis of the first trade and intercourse acts is clear. The laws were necessary to provide a framework for the trade —to establish a licensing system which would permit some control and regulation—but this was merely a restatement of old procedures. The vital sections of the laws dealt with the crisis of the day on the frontier. They sought to provide an answer to the charge that treaties with the Indians, which guaranteed their rights to the territory behind the boundary lines, were not respected by the United States. The laws were not "Indian" laws; they touched the Indian only indirectly, as they limited him in his trade and his sale of land. The legislation was, rather, directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties made with the Indians.

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the Court's decisions in *Moe* and *Colville* foreclose any argument that notions of tribal sovereignty and economic development entitle the tribes "to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, 447 U.S. at 155; *see also Moe*, 425 U.S. at 482-83. In short, federal Indian policy is not premised on the notion that the Indian tribes are entitled to benefit from the tax evasion of persons lawfully subject to state taxing authority. *Cf.* 4 U.S.C. §§ 104-06, 109 (providing that persons other than Indians are not exempt from state income or sales and use taxes for activities occurring on reservations). And given Congress's recognition of the importance of minimizing disruption to state systems for the administration and collection of tax revenues, *see, e.g.*, 28 U.S.C. § 1341 (Tax Injunction Act); 4 U.S.C. §§ 104-111 (Buck Act), the Court should not construe the silence of, or any ambiguities in, the Indian trader statutes as pre-empting New York's scheme. *Cf. Gregory*, 111 S. Ct. at 2403; *United States v. Bass*, 404 U.S. 336, 349 (1971).

The consequences of doing otherwise are simply too great. By the State's estimate, it loses approximately $65 million in cigarette tax revenues on an annual basis. Pet. Br. 11. And while not at issue in this case, the State has likewise lost substantial motor fuel excise tax revenues currently estimated at $35 million annually because of a similar holding of the New York Court of Appeals. *See* Pet. Br. 11 n.4; *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536 (1987). Thus, estimates place the revenue loss at $100 million annually. *See* Pet. Br. 11 & n.4; James Dao, *Ruling Scuttles Plan to Collect Taxes on Reservation Sales*, N.Y. Times, June 11, 1993, at B5. The situation the State confronts is compounded by the assertion of various tribes that the State "has no power or authority to regulate these transactions on the reservations," Br. *Am. Cur.* Seneca Nation of Indians *et al.* (cert. stage) 4, and the refusal of some Indian retailers to collect these taxes. *See, e.g., Snyder v. Wetzler*, 1993

N.Y. App. Div. LEXIS 10523 (Nov. 10, 1993).[6] Accordingly, a holding that the Indian trader statutes pre-empt the State's scheme will, with respect to New York, render illusory *Moe*'s and *Colville*'s affirmation of state authority to collect taxes on sales to non-exempt persons.

New York seeks to use minimally intrusive means to collect from non-Indians a valid excise tax which does not implicate tribal sovereignty interests. In these circumstances, it is inappropriate to apply the "presumption of pre-emption" of state powers. *See, e.g., Rice,* 463 U.S. at 726. Accordingly, under the Court's precedents, the relevant inquiry is whether New York's scheme " 'conflict[s] with the federal enactments,' " here, the Indian trader statutes. *Moe,* 425 U.S. at 483 (quoting *United States v. McGowan,* 302 U.S. 535, 539 (1938) and citing *Thomas v. Gay,* 169 U.S. 264, 273 (1898)). *See also Ramah Navajo School,* 458 U.S. at 847-48 (Rehnquist, J., dissenting); *Central Machinery,* 448 U.S. at 168 (Stewart, J., dissenting); *cf. Rice,* 463 U.S. at 726 (where tribal sovereignty interests are not implicated, Court has "only to determine whether application of . . . state . . . laws would 'impair a right granted or reserved by federal law' ") (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973)).

A careful examination demonstrates that this case presents no conflict between the state and federal schemes. Indeed, the notion that Congress's purpose in enacting the Indian trader statutes was to pre-empt the States in such a functionally important area of sovereignty as the collection of lawfully imposed taxes from non-Indians is difficult to reconcile with the historical context of § 261's

[6] *Snyder* involves a state assessment against Barry E. Snyder, Sr., head of the 6,000 member Seneca Nation, and operator of the "Seneca Hawk" store on the Cattaraugus Reservation, for $6.3 million in uncollected sales and excise taxes on cigarettes and gasoline for the year 1989. *See* Gary Spencer, *State Wins Sales, Excise Tax Ruling Against Indians,* N.Y. Law Journal, Nov. 22, 1993, at 1. The State also has assessments pending against five other Indian retailers. *Id.*

enactment. *See, e.g., Central Machinery,* 448 U.S. at 166 (Indian trader statutes must be interpreted "in light of the intent of the Congress that enacted them[.]"); *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 666 (1979) ("Legislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].' ") (quoting *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206 (1978)).

Nonetheless, the New York Court of Appeals relied on this Court's decision in *Warren Trading Post* to hold that the Indian trader statutes pre-empted the State's tax collection scheme. According to the court, the State's collection scheme "attempts to regulate in an area which Congress has taken 'fully in hand' " and "impinges on the federal interest, as evidenced by the Indian trader statutes, to 'comprehensively . . . regulate businesses selling goods to reservation Indians.' " Pet. App. 11 (internal citations omitted). The court further reasoned that the State's scheme "impinges on" the federal government's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' " *Id.* at 11-12 (quoting 25 U.S.C. § 261). Moreover, the court concluded that the State's scheme imposes "financial burdens on [the wholesalers] or the Indians with whom [they] deal[] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 12 (quoting *Warren Trading Post,* 380 U.S. at 691).

The net effect of the decision is to frustrate the State's ability to collect revenues in an effective and minimally intrusive manner. Yet the design of a State's tax administration and collection scheme surely "is a decision of the most fundamental sort for a sovereign entity," *Gregory,* 111 S. Ct. at 2400, for the State's very existence depends upon it. This untoward result is indefensible

given the absence of any conflict between the State's scheme and the Indian trader statutes. And it is truly regrettable given the State's substantial interest in collecting indisputably valid taxes and the absence of any tribal sovereignty interest in profiting from the evasion of these taxes. *See Colville*, 447 U.S. at 155; *Moe*, 425 U.S. at 482-83.

II. THE INDIAN TRADER STATUTES DO NOT EVIDENCE A CONGRESSIONAL PURPOSE TO PROHIBIT THE STATES FROM ENGAGING IN REASONABLE REGULATION OF INDIAN WHOLESALERS TO PREVENT TAX EVASION BY NON-INDIANS

A. *Moe* and *Colville* Establish the Validity of New York's Scheme

Before analyzing the various provisions of the State's collection scheme, it is worthwhile to revisit this Court's decisions in *Moe* and *Colville*. These cases upheld the validity of taxes similar to those imposed here and the right of the States to impose minimal burdens on Indian retailers. No valid basis exists for distinguishing them.

In *Moe*, this Court held that a State could require an "Indian seller doing business on tribal land" to collect state taxes on the sales of cigarettes to non-Indian purchasers. 425 U.S. at 481-82. In so holding, the Court specifically rejected the tribe's contention that the State's imposition of a collection duty on Indian sellers for taxes owed by non-Indian purchasers was a "gross interference with [its] freedom from state regulation" under *Warren Trading Post*, *id.* at 482, noting that the tax was "validly imposed" and the collection obligation was a "minimal burden." *Id.* at 483.

In *Colville*, the Court upheld a state law requiring tribal smokeshops to collect cigarette taxes from non-Indians as well as non-enrolled Indians who lived on the reservation. The Court rejected the tribe's arguments that the State's law was pre-empted by various federal Indian laws including the Indian trader statutes, was inconsistent

with the principle of tribal sovereignty, and was invalid under the Indian Commerce Clause. 447 U.S. at 154-160. *Moe* and *Colville* thus establish the validity of the taxes which New York seeks to collect.

Of course, in both *Moe* and *Colville* the State sought to impose the collection (and attendant record-keeping and licensing) obligations on the Indian retailer rather than the wholesaler. But given that the Court has already recognized that such obligations impose at most a "minimal burden" on the Indian retailer, *see Colville*, 447 U.S. at 159; *Moe*, 425 U.S. at 483; *cf. Rice*, 463 U.S. at 715 (upholding State's authority to require licensed Indian trader to obtain liquor license because of sales to non-Indians), it is not plausible to suggest that New York's decision to place the collection and record-keeping obligation on the wholesaler is significant enough to render its scheme pre-empted. Imposing the collection and record-keeping obligations on the wholesaler rather than the retailer does not make these burdens any more substantial than those upheld in *Moe* and *Colville*. To the contrary, because there are far more transactions at the retail rather than the wholesale level, the collection and record-keeping requirements upheld in *Colville* are far more burdensome than those imposed by New York's scheme. Indeed, *Colville*'s upholding of the State's right to require Indian retailers to keep detailed records of their transactions with tax-exempt Indians, *see* 447 U.S. at 159, transactions which are as much a part of the Indian trade as those between the wholesaler and retailer, should foreclose any argument that the Indian trader statutes pre-empt a State from placing such obligations on the wholesaler. And the holding below is all the more remarkable given this Court's recent statement in *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 111 S.Ct. 905, 912 (1991), that States can collect cigarette taxes from Indian wholesalers. In any event, the Indian trader statutes do not evidence a congressional purpose to displace New York's tax collection scheme.

B. New York's Scheme Does Not Conflict with the Indian Trader Statutes

New York's scheme for collecting cigarette excise taxes has three principal features. First, the State requires that the tax be paid through the purchase of stamps at the time of the first taxable sale by a wholesaler. *See* N.Y. Tax Law § 471(2). This obligation applies to all wholesalers regardless of whether they supply Indian or non-Indian retailers. *See id.* Second, in recognition that enrolled Indians cannot be taxed on cigarettes they purchase on their reservations for their own consumption, New York allows Indian retailers to purchase tax exempt (unstamped) cigarettes. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.6. To protect against tax evasion by non-Indians, New York nominally limits Indian retailers to purchasing an amount equal to the "probable demand of qualified Indian consumers in the trade territory." N.Y. Comp. Codes R. & Regs. tit. 20, §§ 335.6(d); 335.7(c) & (d). New York also requires wholesalers to obtain approval as to the amount of untaxed cigarettes to be sold from either the tribe or the State. *See id.* § 335.7(b)-(d). Finally, New York requires wholesalers to maintain certain records of their tax exempt cigarette sales. *See id.* § 335.6(g).[7]

In holding that the State's scheme was pre-empted, the New York Court of Appeals articulated three reasons. Relying on the language of 25 U.S.C. § 261, the court reasoned that the State's scheme "impinges on the authority of the Commissioner of Indian Affairs to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" Pet. App. 11-12 (quoting 25 U.S.C. § 261). The court further reasoned that "to the extent that the sales tax is imposed on all stamped cigarettes, the regulations place 'financial burdens on [the wholesalers] or the Indians with whom [they] deal [] in addition to those Congress or the tribes have

[7] New York also imposes record-keeping requirements on taxable sales of cigarettes. *See* N.Y. Tax Law § 474(4).

prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 12 (quoting *Warren Trading Post*, 380 U.S. at 691). Finally, the court reasoned that the State was attempting to regulate in a field which Congress "has taken 'fully in hand.'" *See id.* at 11 (quoting *Warren Trading Post*, 380 U.S. at 690). None of these reasons can withstand scrutiny.

1. *New York's Scheme Does Not Impinge on the Commissioner's Authority Under the Indian Trader Statutes*

Beginning with the First Congress, the federal government has regulated trade with the Indian tribes. *See* Act of July 22, 1790, 1 Stat. 137. As a leading authority explains, trade with the Indian tribes "presented unlimited opportunities for corruption and extortion." Felix Cohen, *Handbook of Federal Indian Law* 348 (1942). The Indian trade laws were thus "directed against the lawless whites on the frontier" and "touched the Indian only indirectly." Prucha, *American Indian Policy* 48. While these laws have undergone various revisions throughout their history, one of their overarching purposes has been to protect Indian tribes from fraudulent practices. *See Central Machinery Co.*, 448 U.S. at 165 (noting that "[o]ne of the fundamental purposes of these statutes and regulations [is] to protect Indians from becoming victims of fraud in dealings with persons selling goods"); H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834) (noting that "[t]he Indians do not meet the traders on equal terms, and no doubt have much reason to complain of fraud and imposition"); *id.* at 95 (report of commissioners) (estimating "the average profits charged on goods in the Indian country at 100 per cent").[8]

In their current version, the Indian trader statutes, 25 U.S.C. §§ 261-64, contain four provisions. These provi-

[8] *See also id.* at 96-97 (detailing disparities between cost of various goods and prices at which sold to the Indians).

sions govern the "[p]ower to appoint traders with Indians," *id.* § 261; the "[p]ersons permitted to trade with Indians," *id.* § 262; the "[p]rohibition of trade by President," *id.* § 263; and "[t]rading without license." *Id.* § 264. At the outset, *amici* submit that none of the principal features of New York's tax collection scheme even arguably implicates the federal government's power to regulate the selection or licensing of "proper person[s] to engage in" trade with the Indians, *see id.* § 262, "to prohibit the introduction of goods" into the Indian country, *see id.* § 263, or to order the forfeiture of goods introduced by unlicensed traders. *See id.* § 264. Accordingly, the only provision of the Indian trader statutes at issue in this case is section 261. This section provides in relevant part:

> The Commissioner of Indian Affairs shall have the sole power and authority to . . . make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

25 U.S.C. § 261.

Relying on this provision, the New York Court of Appeals held that the State's scheme "impinge[d] on" the Commissioner's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" Pet. App. 11-12 (quoting *id.*). But contrary to the decision of the court below, none of the features of New York's tax collection scheme impinges on the Commissioner's authority to "specify[] the kind and quantity of goods and the prices at which such goods shall be sold to the Indians" within the ordinary meaning of these terms.

New York, of course, does not assert that it has the power to dictate the "kind . . . of goods" which Indian wholesalers can sell to Indian retailers. Nor does New York assert the power to "specify the . . . quantity of" cigarettes which Indian wholesalers can sell to Indian

retailers. New York does not limit the amount of taxed product which Indian wholesalers can sell to Indian retailers. To be sure, New York nominally limits the amount of untaxed cigarettes which Indian wholesalers can sell to the "probable demand" of the exempt nation or tribe. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.7(d)(1). But it is incorrect to suggest, as the court below did, that this impinges on the Commissioner's authority to determine the "quantity of goods" that can be sold to the Indians. As the Court noted in *Colville*, federal Indian policy does not authorize Indian tribes "to market an exemption from state taxation to persons who would normally do their business elsewhere." 447 U.S. at 155. The State can thus limit the tribes' purchases of tax-exempt products to the personal consumption of their members as a "reasonably necessary . . . means of preventing fraudulent transactions." *Id.* at 160. New York's provision that the tribes consult with the State regarding their evidence of the probable demand of their enrolled members, *see* N.Y. Comp. Codes R. & Regs., tit. 20, § 335.7(d)(2)(i), is no more burdensome than the scheme upheld in *Colville*, which required retailers to "record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, . . . the dollar amount and dates of sales." 447 U.S. at 159. In short, this aspect of New York's scheme does not interfere with the Commissioner's authority and fully satisfies the requirement that it be a "reasonably necessary . . . means of preventing fraudulent transactions." *Id.* at 160.

Nor does New York's requirement that wholesalers collect the excise tax interfere with section 261's grant to the Commissioner of the "sole power" to "specify[] . . . the prices at which . . . goods shall be sold to the Indians." New York does not assert any authority to regulate the prices which Indian wholesalers charge Indian retailers. To the contrary, Indian wholesalers and retailers remain free to bargain over the price of cigarettes and are fully subject to the Commissioner's regulation "that the prices

charged by licensed traders [be] fair and reasonable." 25 C.F.R. § 140.22.

That New York requires Indian wholesalers to collect the tax due on non-exempt product at the time it is sold to Indian retailers does not mean that it is "specifying . . . the prices at which [cigarettes] shall be sold." 25 U.S.C. § 261. In their ordinary meanings, the terms "price" and "tax" are too distinct to conclude that Congress's purpose in enacting section 261 was not only to grant the Commissioner the sole authority to regulate prices but also to prohibit the States from requiring Indian wholesalers to collect a lawfully imposed excise tax at the time of the product's sale to Indian retailers. *Compare Black's Law Dictionary* 1188 (6th ed. 1990) (defining "price" as "[s]omething which one ordinarily accepts voluntarily in exchange for something else") *with id.* at 1457 (noting that "[e]ssential characteristics of a tax are that it is not a voluntary payment . . . , but an enforced contribution, exacted pursuant to legislative authority"); *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("A tax is an enforced contribution to provide for the support of the government[.]"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 80 (1868) (" 'A tax in its essential characteristics . . . is not founded on contract or agreement.' ") (citation omitted).

An excise tax can, of course, "be added to and collected as part of the sales price" of an item as New York requires. *See* N.Y. Tax Law § 471(3). But when read in light of its purpose of preventing fraud, the language of § 261 cannot be construed as pre-empting States from collecting lawfully imposed taxes at the wholesale level. To the extent a price includes the excise tax lawfully added to the wholesale price because the cigarettes are intended for resale only to non-exempt persons, surely that portion of the price attributable to the tax satisfies the Commissioner's requirement that it be "fair and reasonable." 25 C.F.R. § 140.22. Accordingly, except for where a State seeks to tax enrolled Indians, there is no

conflict between state laws placing the collection obligation on the wholesaler and section 261's grant of authority to the Commissioner to specify the prices of goods sold to Indians. *See, e.g., Moe*, 425 U.S. at 483 (quoting *McGowan*, 302 U.S. at 539 and citing *Thomas*, 169 U.S. at 273).

2. *Congress Did Not Contemplate that the Indian Trader Statutes Would Pre-empt State Efforts to Prevent Tax Evasion*

As the Court has often recognized, "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].' " *Omaha Indian Tribe*, 442 U.S. at 666 (quoting *Suquamish Indian Tribe*, 435 U.S. at 206). The Court has thus interpreted § 261 "in light of the intent of the Congress that enacted [it]." *Central Machinery*, 448 U.S. at 166 (citing *Omaha Indian Tribe*, 442 U.S. at 666; *Suquamish Indian Tribe*, 435 U.S. at 206). The historical context of section 261's enactment demonstrates that Congress could not have envisioned that non-Indians would travel onto reservations in large numbers to evade payment of lawful state taxes.

At the time of section 261's enactment in 1876, federal Indian policy was still largely marked by removal of the Indians from their lands and segregation of them on reservations. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 121-29 (1982 ed.). As the Court has recognized, it was not until 1887 when Congress adopted the General Allotment (Dawes) Act, 24 Stat. 388, that "the eventual assimilation of the Indian population and the 'gradual extinction of Indian reservations and Indian titles' " became the central tenets of federal Indian policy. *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) (quoting *Draper v. United States*, 164 U.S. 240, 246 (1896) and internal citation omitted); *see also* Cohen at 130 (1982 ed.).

Thus, at the time of section 261's enactment, many of the treaties and agreements which had been negotiated

with the various Indian tribes contained provisions in which the United States agreed "to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe[s]." *Montana*, 450 U.S. at 558. For example, Article II of the Treaty With The Crow Indians, May 7, 1868, 15 Stat. 649, 650 provided that "the United States now solemnly agrees that no persons, except those herein designated and authorized to do so . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the exclusive use of said Indians . . . ."[9] And in the

[9] *See also* Treaty With The Omaha Indians, Mar. 6, 1865, art. 4, 14 Stat. 667, 668 ("The whole of the lands . . . shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe."); Treaty With The Lower Brule Indians, Oct. 14, 1865, art. 6, 14 Stat. 699, 700 ("No white person, other than officers, agents or employe[e]s of the United States shall be permitted to go on or remain on the said reservation, unless previously admitted as a member of the said band according to their usages."); Treaty With The Cheyennes And Arrapahoes, Oct. 14, 1865, art. 2, 14 Stat. 703, 704 ("no white person, except officers, agents, and employees of the Government, shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages"); Treaty With The Camanches And Kioways, Oct. 18, 1865, art. 2, 14 Stat. 717, 718 (same); Treaty With The Choctaws And Chickasaws, Apr. 28, 1866, art. 43, 14 Stat. 769, 779 (same); Treaty With The Cherokee Indians, July 19, 1866, art. 27, 14 Stat. 799, 806 ("all persons not in the military service of the United States, not citizens of the Cherokee nation, are to be prohibited from coming into the Cherokee nation"); Treaty With The Ute Indians, Mar. 2, 1868, art. 2, 15 Stat. 619, 620 ("no persons, except those herein authorized so to do, and except such officers, agents, and employe[e]s of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the" reservation); Treaty With The Sioux Indians, Apr. 29, 1868, art. 2, 15 Stat. 635, 636 (same); Treaty With The Navajo Indians, June 1, 1868, art. 2, 15 Stat. 667, 668 (same); Treaty With The Shoshonees And Bannacks, July 3, 1868, art. 2, 15 Stat. 673, 674 (same).

Trade and Intercourse Act of 1834, Congress, in addition to requiring licenses to trade with the Indians, prohibited non-Indians from obtaining through barter with the Indian tribes any goods except skins and furs, a provision which remained in effect until 1953. Act of June 30, 1834, ch. 161, §§ 2, 4, & 7, Stat. 729, 730.[10]

In 1876, federal policy thus greatly circumscribed trade and intercourse between Indians and non-Indians.[11] The historical context of section 261's enactment demonstrates that Congress did not contemplate that Indian trading posts would become centers of widespread tax evasion by non-Indians, selling millions of dollars a year in untaxed goods to them. Because section 261 " 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted' " it, *Omaha Indian Tribe*, 442 U.S. at 666 (quoting *Suquamish Indian Tribe*, 435 U.S. at 206), it is inappropriate to attribute to it pre-emptive force over New York's effort to collect lawful taxes. *Cf. Gregory*, 111 S. Ct. at 2403; *Bass*, 404 U.S. at 349.

[10] The exception for skins and furs stems from § 7 of the Act of Apr. 18, 1796, Ch. 13, 1 Stat. 452, 453, and likely owed to the great economic and political significance of the fur trade.

This provision was repealed by the Act of Aug. 15, 1953, Ch. 506, § 1, 67 Stat. 590.

[11] At the time of section 261's enactment, several other provisions of the 1834 act which greatly limited contact between white settlers and the Indians remained in force. *See* Act of June 30, 1834, ch. 161, § 8 (prohibiting trapping in Indian country); *id.* § 9 (prohibiting grazing without tribal consent in Indian country); *id.* §§ 10-11 (authorizing federal government to use military force to remove intruders and settlers from Indian country); *id.* § 12 (prohibiting non-governmental sale, lease, or conveyance of lands by Indians to non-Indians).

3. *Requiring Wholesalers to Collect Tax Due on Cigarettes Which Will Ultimately be Borne By Non-Indians Does Not Place an Impermissible Burden on Either Wholesalers or Retailers and Does Not Frustrate the Statutory Purpose*

The New York Court of Appeals also held that to the extent the State collected tax on stamped cigarettes, it imposed "'financial burdens on [the wholesalers] or the Indians with whom [they] deal[] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.'" Pet. App. 12 (quoting *Warren Trading Post*, 380 U.S. at 691). The court's rationale, however, ignores not only the factual context of *Warren Trading Post*, but also this Court's decisions in *Moe* and *Colville*.

In *Warren Trading Post*, the Court held that the Indian trader statutes pre-empted a State from imposing a gross receipts/gross income tax on a licensed Indian trader which engaged in retail trading with reservation Indians. 380 U.S. at 690-91. The trader, however, did not claim that it was exempt from taxation on its sales to non-Indians. *See id.* at 686. Thus, the Court's statement in *Warren Trading Post* that the tax "would put financial burdens on [the trader] or the Indians with whom it deals," *id.* at 691, is properly read as applying only to those taxes which are ultimately borne by reservation Indians. *See Moe*, 425 U.S. at 482. This conclusion is further supported by the Court's comment that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Warren Trading Post*, 380 U.S. at 691 (footnote omitted).[12]

[12] This conclusion is also consistent with the Court's decision in *Central Machinery Co.*, which invalidated, under the Indian trader statutes, a "transaction privilege tax" imposed on the sale of farm machinery to a tribal enterprise. *See* 448 U.S. at 161-65. The tax, however, was added to the price of the machinery and was borne by reservation Indians. *Id.*

In contrast to the tax at issue in *Warren Trading Post*, New York does not place the financial burden of the excise tax on either the wholesale trader or tax-exempt reservation Indians. Rather, under New York's scheme, the tax is ultimately borne by non-exempt persons who receive the benefit of the many services the State provides. *See* Pet. App. 4 (noting that tax "is ultimately added to the retail price and is paid by the consumer"); N.Y. Tax Law § 471(2). The tax, therefore, does not "put financial burdens on [the traders] or the Indians with whom [they] deal." *Warren Trading Post*, 380 U.S. at 691; *see also Colville*, 447 U.S. at 154-61 (upholding State's authority to require tribal smokeshop to collect tax on sales to non-Indians and non-enrolled Indians); *Moe*, 425 U.S. at 482 (distinguishing *Warren Trading Post* on grounds that "[u]nlike the sales tax here, the tax was imposed directly on the seller, and . . . there was . . . no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians").[13] It is only fair

[13] *Amici* believe that the court of appeals' statement that the State's tax scheme imposed "financial burdens on [plaintiffs] or the Indians with whom [they] deal[]," *see* Pet. App. 12, was concerned solely with the burden of the tax itself and not the burden of lost sales caused by having to collect tax on sales to non-exempt persons or the cost of complying with the State's record-keeping requirements. In any event, *Moe* and *Colville* make clear that New York's tax on non-Indians purchasing goods at a reservation store is "valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Colville*, 447 U.S. at 151 (discussing *Moe*) (footnote omitted). As the Court stated in *Colville*, "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [do not] authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155; *see also Moe*, 425 U.S. at 482, 483 (noting that "the competitive advantage which the Indian seller . . . enjoys over all other cigarette retailers . . . is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax" and holding that "to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian propri-

that those individuals receiving the benefit of state provided services should not be allowed "to flout [their] legal obligation to pay the tax[es]" which fund them. *Moe*, 425 U.S. at 482.

Nor does the State's scheme disturb the Congressional purpose of protecting Indians from either fraudulent or "unfair or unreasonable" prices. *Warren Trading Post*, 380 U.S. at 691. As stated before, New York does not assert any authority to regulate the prices of goods sold to the Indians. And there can be no contention that the State's scheme frustrates the Congressional purpose because unscrupulous wholesalers might attempt to collect cigarette tax on products earmarked for purchase by tax-exempt Indians. Under New York law, tax stamps must be affixed to packages of cigarettes as evidence of payment of the tax. *See* N.Y. Tax Law § 471(2). Moreover, for each delivery, invoices (in duplicate) must detail "the number of packages and cigarettes contained therein . . . and the items and quantity and wholesale price of each item. . . ." *Id.* § 474(4); *see also* N.Y. Comp. Codes R. & Regs., tit. 20, § 335.6(g)(2) ("Every . . . invoice . . . given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to

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etor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof").

Colville likewise upheld *in toto* the State of Washington's detailed record-keeping requirements as a "reasonably necessary . . . means of preventing fraudulent transactions." *See* 447 U.S. at 160. Under Washington's scheme, Indian retailers were required to "record the number and dollar volume of taxable sales to nonmembers of the Tribe [and] [w]ith respect to nontaxable sales, . . . record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales." *Id.* at 159. Sales by retailers to tax-exempt Indians are, of course, as much a part of the Indian trade as sales by wholesalers to retailers. And New York's record-keeping requirements are no more burdensome than those upheld in *Colville*. *See* N.Y. Comp. Codes R. & Reg. tit. 20, § 335.6(g).

be paid by the exempt purchaser for such cigarettes."). The State's requirements that stamps be affixed to taxable cigarettes and invoices list the items, quantity and wholesale price of cigarettes being delivered, provides the Indian retailer with adequate protection against fraudulent overcharging. Accordingly, there is no basis for the New York Court of Appeals' conclusion that the State's scheme "could disturb and disarrange" Congress's plan to protect the Indians from "unfair or unreasonable" prices. Pet. App. 12.

4. *Decisions Subsequent to* Warren Trading Post *Demonstrate that the Indian Trader Statutes Do Not Foreclose All State Regulation of Traders*

The New York Court of Appeals also relied on *Warren Trading Post* to hold that the State's scheme was preempted because it "attempts to regulate in an area which Congress has taken 'fully in hand.'" Pet. App. 11 (quoting 380 U.S. at 690). The Court has, of course, invoked *Warren Trading Post* for the proposition that the Indian trader statutes occupy the field. *See Central Machinery*, 448 U.S. at 165-66 ("by enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject'") (quoting 380 U.S. at 691 n.18). But as the four dissenting justices in *Central Machinery* explained, the Court has "rejected the contention that the Indian trader statutes occupy the field so completely as to pre-empt all state laws affecting those who trade on the reservation with reservation Indians." 448 U.S. at 167 n.1 (Stewart, J., dissenting, joined by Powell, J., Rehnquist, J., & Stevens, J.); 448 U.S. at 172 ("Our most recent cases undermine the notion that 25 U.S.C. §§ 261-264 occupy the field so as to pre-empt all state regulation affecting licensed Indian traders.") (Powell, J., dissenting).

In *Moe*, for example, a unanimous Court rejected a claim that *Warren Trading Post* barred a State from re-

quiring Indian retailers to collect tax on sales to non-Indians. 425 U.S. at 481-82. And *Colville*'s upholding of a state requirement that Indian retailers maintain detailed records of their sales to tax-exempt Indians puts to rest any claim that Congress pre-empted all state regulation of Indian trading. *See* 447 U.S. at 159-60. As *Colville* makes clear, the Indian trader statutes do not pre-empt state requirements "reasonably necessary as a means of preventing fraudulent transactions." 447 U.S. at 160. Because the State's scheme satisfies this standard, the New York Court of Appeals erred in holding that it was pre-empted.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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